No. 77-176

# In the Supreme Court of the United States

OCTOBER TERM, 1977

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MINERAL VENTURES, LIMITED, PETITIONER

*v.*

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1—A-2) is not reported. The recommendation and order of the United States Magistrate and the order of the district court (Pet. App. A-3—A-11) are not reported. The opinion of the Department of the Interior Board of Land Appeals (Pet. App. A-12—A-36) is reported at 14 IBLA 82.

## JURISDICTION

The judgment of the court of appeals was entered on May 3, 1977. The petition for a writ of certiorari was filed on August 1, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Department of the Interior lacked jurisdiction under Section 5 of the Surface Resources Act of 1955 to determine the surface rights to petitioner's unpatented mining claims, where petitioner had actual notice of the determination and participated in it, because the non-existence of tract indexes for the area prevented preparation of the certificate based on examination of such indexes which the Act provides for in order to assure notice to interested parties.

2. Whether a district court must conduct a trial and make findings of fact, and may not render a summary judgment, when reviewing an adjudication by the Department of the Interior, made on the record after an agency hearing, to determine whether that adjudication was supported by substantial evidence.

3. Whether substantial evidence supported the Department of the Interior's decision that the surface resources overlying petitioner's unpatented mining claims were subject to management by the government because petitioner had failed to establish the discovery of valuable mineral deposits on the claims.

## STATUTE INVOLVED

Section 5 of the Surface Resources Act of 1955, 69 Stat. 369, as amended, 30 U.S.C. 613, is set forth at Pet. App. A-58—A-62.

## STATEMENT

Section 4 of the Surface Resources Act of 1955, 69 Stat. 368, 30 U.S.C. 612, generally reserves to the United States the right to manage and dispose of the surface resources of unpatented mining claims located after July 23, 1955, the Act's effective date. With respect to unpatented claims located before that date, Section 5 of



the Act, 69 Stat. 369, 30 U.S.C. 613, sets forth a procedure for determining the government's surface rights and the rights of persons asserting interests in such claims.

Under Section 5(a), agencies responsible for administering surface resources of public lands may request the Department of the Interior to publish a notice to mining claimants for determination of surface rights. The request must be accompanied by an affidavit showing that the lands have been physically examined to determine whether anyone is in actual possession of them or is working them, and must be accompanied also (30 U.S.C. 613(a))—

> by the certificate of a title or abstract company, or of a title abstractor, or of an attorney, based upon such company's[,] abstractor's, or attorney's examination of those instruments which are shown by the tract indexes in the county office of record as affecting the lands described in said request, setting forth the name of any person disclosed by said instruments to have an interest in said lands under any unpatented mining claim heretofore located, * * *.

The statute (*ibid.*) then defines "tract indexes" as—

> those indexes, if any, as to surveyed lands identifying instruments as affecting a particular legal subdivision of the public land surveys, and as to unsurveyed lands identifying instruments as affecting a particular probable legal subdivision according to a projected extension of the public land surveys.

The notice published by the Department of the Interior notifies any interested person to file a verified statement describing his interest in the unpatented mining claim. *Ibid.* If such a statement is filed, the Secretary of the Interior is directed to conduct "a hearing to determine

the validity and effectiveness" of the mining claimant's interest, insofar as it is contrary to or in conflict with the government's claim to surface resources. 30 U.S.C. 613(c). "The procedures with respect to notice of such a hearing and the conduct thereof, and in respect to appeals shall follow the then established general procedures and rules of practice of the Department of the Interior in respect to contests or protests affecting public lands of the United States." *Ibid.*

The validity of an unpatented mining claim located on public lands depends, *inter alia*, on the discovery of a valuable mineral deposit. Rev. Stat. 2319, 30 U.S.C. 22.

Pursuant to Section 5 of the Surface Resources Act, the Chief of the Forest Service, United States Department of Agriculture, requested the Department of the Interior to publish a notice for a determination of whether the United States had the right to manage the surface resources of petitioner's three unpatented mining claims in Siskiyou National Forest, Oregon (Pet. App. A-15). The request was accompanied by an affidavit attesting that the lands had been examined and that no one was in actual possession of them or was working them, and by a second affidavit attesting that no tract index for the area existed. A notice to mining claimants was published and actual notice was received by petitioner, which filed a verified statement setting forth its interest (Pet. App. A-5, A-35). A hearing was then conducted before an administrative law judge (Pet. App. A-15).

The administrative law judge rejected petitioner's contentions that alleged defects in the notice and its accompanying affidavits required dismissal of the proceeding. He held that the notice was not defective and that no prejudice to petitioner had been shown (Pet. App. A-37—A-39). On the merits, the administrative law judge found that petitioner had not established discovery



of a valuable mineral deposit prior to July 23, 1955. The evidence showed that the claims contained assayable gold ore. It was in conflict, however, as to whether extraction of the gold was economically feasible. Resolving the conflict, the administrative law judge found that it was not (Pet. App. A-39—A-57).

The Interior Board of Land Appeals affirmed (Pet. App. A-12—A-36).

Petitioner sought judicial review of the agency's decision in the district court under 5 U.S.C. 704. The Secretary, relying on the administrative record, moved for summary judgment under Rule 56(b) of the Federal Rules of Civil Procedure. Petitioner moved for judgment on the record (Pet. App. A-3). The district court adopted the recommendation of the magistrate that the Secretary's motion should be granted (Pet. App. A-3—A-10).

The court of appeals affirmed (Pet. App. A-1—A-2). It agreed that substantial evidence supported the determination "that no valid discovery of a valuable mineral deposit had been made prior to the effective date of the Act" (Pet. App. A-1). It concluded, however, that insofar as the administrative determination involved a portion of one of petitioner's claims that was located in California and had not been so described by the notices, the district court's judgment should be vacated and remanded for entry of an amended judgment limited to the claims within the State of Oregon.[1]

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[1]A portion of petitioner's Enterprise claim extends 1,000 feet into California. It was not so described in the notice. The ALJ held that the California portion did not have to be considered because petitioner's predecessors in title had split it from the Oregon portion and the government had relied on information to this effect furnished by the claimant's attorney (Pet. App. A-38). The IBLA agreed, but extended the decision to the California portion on the ground that

## ARGUMENT

1. Petitioner contends that the Department of the Interior lacked jurisdiction over the proceeding because the request of the Department of Agriculture for a determination of the government's surface rights was not accompanied by a certificate of title based on either a title search by a government attorney of tract indexes showing mining claims in the county records, or a certificate of title prepared by an abstract company or a title abstractor (Pet. 19). The statute on its face rebuts this contention. It provides that the certificate is to be "based upon * * * examination of those instruments which are shown by the tract indexes in the county office of record * * *." 30 U.S.C. 613(a). "Tract indexes" are defined as "those indexes, if any," that identify instruments as affecting particular subdivisions in surveyed or unsurveyed lands. *Ibid.* If there are no tract indexes, there can be no certificate based on an examination of instruments shown by such indexes. The district court correctly held (Pet. App. A-5) that "as the Act only requires a certificate of title to be made from examination of a tract index, the nonexistence of a tract index excuses compliance with the provision." *Converse* v. *Udall*, 262 F. Supp. 583, 592 (D. Ore.), affirmed, 399 F. 2d 616 (C.A. 9), certiorari denied, 393 U.S. 1025. Moreover, as the district court found, petitioner "was completely informed of the proceeding because it filed a timely verified statement" (Pet. App. A-5). Since petitioner had actual notice and a full opportunity to present its case, it has no grounds for complaint.

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by failing to describe that portion in its verified statement, petitioner had waived its rights under Section 5 (Pet. App. A-32). In effect, the court of appeals agreed with the ALJ that the case was confined to petitioner's claims in Oregon.



2. Equally without merit is petitioner's contention (Pet. 8-18) that in reviewing the record the district court should have conducted a trial to resolve disputed issues of fact and should have made findings of fact. The adjudication in this case was required by the Act to be made on the record after notice and opportunity for a hearing in accordance with the procedures governing contests affecting public lands. 30 U.S.C. 613(c); 5 U.S.C. 554. In such proceedings it is the agency's responsibility to resolve all material issues of fact. 5 U.S.C. 557. The district court's function on review of such a determination is to examine the record to determine whether the agency's resolution of the issues is supported by substantial evidence and is in accordance with law. 5 U.S.C. 706. On such review evidence outside the administrative record is ordinarily inadmissible. See, *e.g.*, *City of New York* v. *United States*, 337 F. Supp. 150, 162 (E.D. N.Y.) (three-judge district court); *Nickol* v. *United States*, 501 F. 2d 1389 (C.A. 10); *Foster* v. *Seaton*, 271 F. 2d 836, 838 (C.A.D.C.). Summary judgment is therefore an appropriate procedure. *Dredge Corporation* v. *Penny*, 338 F. 2d 456, 462 (C.A. 9); *Henrikson* v. *Udall*, 229 F. Supp. 510 (N.D. Cal.), affirmed, 350 F. 2d 949 (C.A. 9), certiorari denied, 384 U.S. 940.

In this case the district court's decision granting summary judgment was accompanied by a report of the United States Magistrate (Pet. App. A-3—A-10), adopted by the district court (*id.* at A-10), which explains the grounds for the decision. Contrary to petitioner's contention (Pet. 10), the ruling of the court of appeals is therefore consistent with *Nickol* v. *United States*, *supra*, which held that a district court should not grant summary judgment on review of an administrative record without indicating "how it arrived at its conclusions, and what, in its opinion,

were the operative facts for which it found the substantial evidence." 501 F. 2d at 1391. Accord, *Multiple Use, Inc.* v. *Morton*, 504 F. 2d 448, 452 (C.A. 9). See *Heber Valley Milk Co.* v. *Butz*, 503 F. 2d 96 (C.A. 10).

3. The two courts below correctly held that substantial evidence supports the administrative determination. No discovery of a valuable mineral deposit under 30 U.S.C. 22 was shown because petitioner failed to establish that it was economically feasible to extract the gold ore on its claims. 30 U.S.C. 22. See *United States* v. *Coleman*, 390 U.S. 599. As the court of appeals noted (Pet. A-2):

> The evidence before the administrative law judge was in conflict. The government witnesses tended to prove that the low-yield, scattered showings of gold were not worth the cost of recovery. The claimant's evidence tended to show that some valuable mineral had been recovered between 1920 and 1940, but this generalized testimony failed to satisfy the trier that there was a discovery under the test of *United States* v. *Coleman*, 390 U.S. 599 (1968).

There is no reason for this Court to re-examine this essentially evidentiary issue.



## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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